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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DYLAN TELLEZ, a Minor, etc., et al.,

Plaintiffs and Appellants,

v.

CITY OF POMONA,

Defendant and Respondent.

B284099

(Los Angeles County
Super. Ct. No. BC592409)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert A. Dukes. Affirmed.

L.A. Trial Lawyers, Inc., Dmitriy Aristov and Alexander H. Escandari; Matthew J. Kita for Plaintiff and Appellant.

Alvarez-Glasman & Colvin, Roger A. Colvin and Sharon Medellin for Defendant and Respondent.

Dylan Tellez sued the City of Pomona for gross negligence, alleging a city emergency dispatcher falsely told Tellez's mother that County of Los Angeles paramedics were en route to treat his choking emergency when in fact they were not. Tellez appeals from a judgment of dismissal entered after the trial court sustained the city's demurrer without leave to amend.

We conclude that Tellez failed to allege the degree of negligence necessary to overcome the conditional immunity afforded by Health and Safety Code section 1799.107 to emergency dispatchers. We therefore affirm the judgment.

BACKGROUND

Because this case comes to us upon a judgment of dismissal after the trial court sustained defendant's demurrer, we take as true the facts alleged in the complaint.

On the evening of January 7, 2014, three-year-old Dylan Tellez began choking on an unknown substance at his family residence in Pomona, and was unable to breathe. Dylan's mother called 911 and informed the dispatcher at least six times that Dylan was choking. The dispatcher repeatedly stated she could not understand what was happening, and the call ended abruptly. Another member of the household immediately called back, but spoke only Spanish. The dispatcher stated she did not speak Spanish, whereupon Dylan's mother came back on the line and repeated that Dylan was choking. The 911 dispatcher stated that police and paramedics were on the way. The dispatcher then patched Dylan's mother through to a fire department dispatcher, who gave her instructions.

Approximately five minutes later, City of Pomona police officers arrived at the scene and radioed for an estimated time of arrival for the paramedics. Receiving no response, the officers

decided not to wait, and officers transported Dylan directly to the hospital. Dylan suffered permanent, debilitating injuries as a result of being deprived of prompt medical care.

No paramedics ever responded to the scene.

Dylan sued the City of Pomona for “gross negligence,” seeking general and special damages. He alleged the city was grossly negligent because: (1) The dispatcher failed to understand Dylan’s mother when she stated at least six times that her son was choking; (2) the dispatcher claimed that paramedics were on their way when they were not; (3) the city failed to provide a Spanish translator in the 911 call center; (4) the city failed to provide a Spanish translator during the call with the Fire Department/Paramedics; (5) the police failed to wait for an ambulance to arrive before transporting Dylan to the hospital; and (6) the city failed to provide such emergency medical services to Dylan.

The City of Pomona demurred to Dylan’s second amended complaint on the grounds that the city could not be held liable for gross negligence in the absence of a special relationship giving rise to a duty to act; the city was entitled to absolute immunity under Government Code sections 845, 820.2, and 815.2; and the city was entitled to conditional immunity under Health and Safety Code section 1799.107 absent a showing of gross negligence, which the complaint failed to allege.

The city also requested judicial notice of the existence of a 1994 resolution seeking the city’s inclusion in and annexation to the fire protection and emergency medical services of the County of Los Angeles, the result being that paramedics serving the city were employees of the county, not the city.

The trial court sustained the city's demurrer without leave to amend pursuant, it stated, "to the grounds set forth in the moving papers."

Dylan appealed from the subsequent judgment of dismissal.

DISCUSSION

On review of a trial court's order sustaining a demurrer we "examine the complaint de novo." (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415.) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

"A public entity is not liable for an injury," "[e]xcept as otherwise provided by statute." (Gov. Code, § 815, subd. (a).)

No statute imposes *direct* liability on a public agency that employs an emergency dispatcher for the dispatcher's failure or delay in responding to a 911 call. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1178 (*Eastburn*).)

Government Code section 815.2, subdivisions (a) and (b) make a public entity *vicariously* liable for its employee's negligent acts or omissions within the scope of employment, except where the entity or employee is immune from liability for such injuries. (*Eastburn, supra*, 31 Cal.4th at p. 1180.)

Health and Safety Code section 1799.107 provides immunity to both a city and its employees for the ordinary negligence of an emergency dispatcher. Subdivision (b) of that section states that “neither a public entity nor emergency rescue personnel shall be liable for any injury caused by an action taken by the emergency rescue personnel acting within the scope of their employment to provide emergency services, unless the action taken was performed in bad faith or in a grossly negligent manner.”¹

¹ Health and Safety Code section 1799.107, titled “Emergency Medical Services – Liability Limitation,” provides in full: “(a) The Legislature finds and declares that a threat to the public health and safety exists whenever there is a need for emergency services and that public entities and emergency rescue personnel should be encouraged to provide emergency services. To that end, a qualified immunity from liability shall be provided for public entities and emergency rescue personnel providing emergency services.

“(b) Except as provided in Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code, neither a public entity nor emergency rescue personnel shall be liable for any injury caused by an action taken by the emergency rescue personnel acting within the scope of their employment to provide emergency services, unless the action taken was performed in bad faith or in a grossly negligent manner.

“(c) For purposes of this section, it shall be presumed that the action taken when providing emergency services was performed in good faith and without gross negligence. This presumption shall be one affecting the burden of proof.

“(d) For purposes of this section, ‘emergency rescue personnel’ means any person who is an officer, employee, or member of a fire department or fire protection or firefighting

In sum, a public entity that employs an emergency dispatcher may be held vicariously liable for the dispatcher's actions only if they involve gross negligence or bad faith. (*Eastburn, supra*, 31 Cal.4th at p. 1185.)

To state facts constituting gross negligence, a plaintiff must allege conduct involving either “ ‘the want of even scant care or an extreme departure from the ordinary standard of conduct’ ” (*Eastburn, supra*, 31 Cal.4th at pp. 1185-1186), i.e., conduct that demonstrates “ ‘such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results . . .’ ” (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640).

Here, Dylan alleged that the City of Pomona and its dispatcher were grossly negligent in five respects: (1) The dispatcher failed to understand his mother during the first phone call; (2) the dispatcher claimed that paramedics were on their way when they were not; (3) the city failed to provide a Spanish translator, either in the city's 911 call center or during the subsequent call with the fire department; (4) the city's police

agency of the federal government, the State of California, a city, county, city and county, district, or other public or municipal corporation or political subdivision of this state, or of a private fire department, whether that person is a volunteer or partly paid or fully paid, while he or she is actually engaged in providing emergency services as defined by subdivision (e).

“(e) For purposes of this section, ‘emergency services’ includes, but is not limited to, first aid and medical services, rescue procedures and transportation, or other related activities necessary to insure the health or safety of a person in imminent peril.”

officers failed to wait for an ambulance to arrive; and (5) the city failed to provide emergency medical services.

None of these facts demonstrates such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results. That one person fails on an occasion to understand another is an everyday occurrence between even the best intentioned. And it appears from Dylan's allegations that the police officers' decision not to wait for an ambulance saved his life.

A city cannot be held liable simply for failure to provide translators in its 911 call centers, for three reasons. First, a public entity cannot be held liable for failing to provide police or fire protection services in the first instance. (Gov. Code, §§ 845 ["Neither a public entity nor a public employee is liable for failure to establish a police department or otherwise to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service"], 850 ["Neither a public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection service"].) If a city need not provide emergency services at all, it need not provide translators for emergency services.

Second, a public employee may not be held liable for discretionary actions or policy decisions. (See Gov. Code, §§ 820.2 ["Except as otherwise provided by statute, a public employee is not liable for any injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused"], 815.2, subd. (b) ["Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission

of an employee of the public entity where the employee is immune from liability”].) The decision not to place dispatchers in emergency call centers is an exercise of discretion for which public employees are immune from liability.

Third, failure to provide interpreters does not demonstrate indifference toward non-English speakers. If it did, every emergency call center would have to be staffed 24 hours a day with translators for every language.

Only one alleged delict by the city’s dispatcher presents even a remote possibility of gross negligence: The dispatcher told Dylan’s mother that paramedics were on their way when in fact they were not. But this claim fails too.

Dylan never alleges any *fact* indicating paramedics were not dispatched to his emergency, he alleges only that the city “failed to *properly* notify and/or dispatch the fire department.” The allegation that the city acted improperly is a legal conclusion we need not accept as true.

No alleged fact supports the conclusion. Dylan alleges that paramedics failed to arrive at his house within five minutes, and police received no confirmation that they were en route. But Los Angeles County has a limited number of fire stations serving a broad geographic area with thousands of structures and millions of people. It cannot reasonably be inferred that on any given occasion a response time of more than five minutes means no unit has been dispatched. Further, it cannot reasonably be inferred simply from lack of interagency confirmation of a dispatch that the dispatch never occurred.

Even if Dylan alleged the city acted improperly, improper conduct, without more, constitutes only ordinary negligence, not

the gross negligence necessary to take the city outside the protection of Health and Safety Code section 1799.107.

Dylan also alleges that paramedics *never* arrived at the scene of the emergency, even after the police had left. But none were needed after the police left with Dylan for the hospital. Failure of an emergency unit to arrive after there is no longer an emergency does not suggest the unit was never dispatched.

Dylan alleges the 911 dispatcher told his mother that help was on the way when she knew or had reason to know it was not. But he also alleges that the dispatcher transferred his mother to the fire department itself, which then tried to help her. This ambivalent pleading—that the dispatcher demonstrated both a passive and indifferent attitude toward his situation and an attentive and helpful—requires explanation. If Dylan means to allege that the dispatcher who connected his mother to the fire department then deliberately concealed from both her and the department that no paramedics would be dispatched, he should state that dubious fact. That he has not stated it justifies the sustaining of his demurrer. That his attorney has not offered to state it justifies denial of leave to amend.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

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CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.